

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

-----X	:	
STERLING EQUIPMENT, INC.,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	04-12313 NMG
M.A.T. MARINE, INC.,	:	
Defendant.	:	IN ADMIRALTY
	:	
-----X		

**PLAINTIFF'S SECOND MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR REAL ESTATE ATTACHMENT**

NOW COMES plaintiff, Sterling Equipment, Inc. (hereinafter referred to as "Sterling"), and by and through its attorneys, hereby submits this memorandum of law in further support of its request for an order authorizing the issuance of process of attachment of real estate standing in the name of defendant, M.A.T. Marine, Inc. (hereinafter referred to as "M.A.T. Marine"), to the amount requested herein.

I. Procedural Posture of the Case

On Thursday, November 4, 2004, the parties appeared before this Honorable Court for a hearing on the merits in connection with Sterling's request for the issuance of a limited writ of pre-judgment attachment against certain real estate owned by defendant, M.A.T. Marine, Inc. In opposition thereto, M.A.T. Marine does not dispute the underlying contractual breach; instead, defendant seeks to limit the type of attachment to personal property on the mistaken basis that the attachment of its real estate would somehow impair its ability to negotiate with the foreclosing lender, Slade Ferry Trust Company. As set forth in the attached correspondence from Messrs. Saunders & Michaud, LLP (**Exhibit A**), the mortgagee/bank does not object to

Sterling's request for real estate attachment. Accordingly, plaintiff renews its request for the issuance of a limited writ of attachment against the real estate of defendant located on Fish Island in New Bedford, Massachusetts.

II. Legal Discussion

The Court has requested that the parties submit supplemental legal memoranda by noontime on Tuesday, November 9, 2004, on the appropriateness of the requested attachment. Specifically, the Court has asked plaintiff to answer the question whether it would be in the same secured position with an attachment of non-exempt personal property.

To answer the Court's query, plaintiff has not found a basis in law for its election of a real estate attachment over the attachment of defendant's non-exempt personalty. All real and personal property of M.A.T. Marine which may be taken by execution is subject to attachment (with certain exceptions). M.G.L. c. 223, §42.

There are, however, practical considerations that should be addressed. Unlike the attachment of real estate, non-exempt personal property is usually attached by the officer taking physical possession of the property. *Tourles v. Hall*, 341 Mass. 299, 168 N.E.2d 505 (1960). To ease the burden that often results from retention of property by the attaching officer, a keeper is usually appointed to take custody of the property. M.G.L. c. 223, §§48-49. Where personal property is bulk goods or fixtures difficult to move, the officer may leave the property where it is located after the attachment. M.G.L. c. 223, §50.

In the case at bar, the personal property being offered consists of various vehicles, trailers, construction and related equipment. The property described in **Exhibit B** hereto is covered by the lender's all-asset security interest. These items are not in the nature of bulk

goods or fixtures, and will certainly involve the appointment and additional cost of a keeper. In addition, plaintiff, as the attaching creditor, will be subject to liability not otherwise present if it were allowed to attached the Fish Island realty.

Under Massachusetts law, a plaintiff may attach personal property which is subject to a mortgage, pledge, lien or other security interest. M.G.L. c. 223 §§74-83A. However, a secured party may, within a reasonable time after attachment, make a demand for payment of the amount of the security interest. M.G.L. c. 223, §75. The attaching creditor must then pay the amount of the security interest to the secured party within ten (10) days. M.G.L. c. 223, §74. This requirement of paying the secured creditor upon demand does *not* apply to mortgagees of real estate. *Id.*

With respect to the tug CHICOPEE, defendant has not complied with the conveyancing requirements of Title 46 of the United States Code,¹ and therefore, plaintiff has no ability to record a writ of attachment with the proper governmental authority should one issue.² Furthermore, the *inchoate* nature of maritime liens makes it impractical to attach any vessel without the benefit of a preferred mortgage lien.

¹**§ 31321. Filing, recording, and discharge.** (a)(1) A bill of sale ... that includes any part of a documented vessel ..., must be filed with the Secretary of Transportation to be valid, to the extent the vessel is involved, against *any person* except - - * * * (C) a person having actual notice of the sale, (Emphasis added.) See, *Mullane v. Chambers*, 333 F.3d 322 (1st Cir. 2003).

²Plaintiff has obtained a certified Abstract of Title (CG-1332) on the vessel from the United States Coast Guard's National Vessel Documentation Center ("NVDC"). A true copy of the Abstract of Title, dated November 3, 2004, is attached hereto and marked as **Exhibit C**. The last owner of record is C & M Marine Towing, Inc., formerly of Bristol, Rhode Island.

III. Conclusion

Based upon the foregoing, Sterling has satisfied the requirements of Chapter 223 of the Massachusetts General Laws and Rule 4.1 of the Massachusetts Rules of Civil Procedure, and is therefore entitled to the limited attachment of defendant's property located at Fish Island in New Bedford, Massachusetts, in the requested amount of Fifty Thousand and 00/100 Dollars (\$50,000.00).

Dated: November 9, 2004

Respectfully submitted,
STERLING EQUIPMENT, INC.
By its attorneys,

NORMAN A. PELOQUIN, II P.C.

By: /s/ Norman A. Peloquin, II
Norman A. Peloquin, II, Esquire
(BBO No. 550872)
Morad Building, 460 County Street
New Bedford, MA 02740-5107
Tel. 508-991-2300
Fax 508-991-8300

Certificate of Service

I hereby certify that on the 9th of November, 2004, I served a copy of the foregoing document by facsimile upon defendant's counsel, Victor Bass, Burns & Levinson LLP, 125 Summer Street, Boston, MA 02110.

/s/ Norman A. Peloquin, II
Attorney-at-Law

Exhibit A

LAW OFFICES OF

SAUNDERS & MICHAUD, LLP

Andrew B. Saunders
Joseph L. Michaud
Sandra G. Saunders
Christopher T. Saunders

November 9, 2004

700 Pleasant Street
New Bedford, MA 02740
Tel: (508) 999-0600
Fax: (508) 999-5400
E-mail: smllp@conversent.net

Attorney Norman A. Peloquin, II
460 County Street
New Bedford, MA 02740

RE: M.A.T. Marine, Inc.

Dear Attorney Peloquin:

Following up your correspondence dated November 4, 2004, concerning the civil action pending in the United States District Court between Sterling Equipment, Inc. and M.A.T. Marine, Inc., we advise that our client, Slade's Ferry Trust Co. takes no position as it relates to your client's efforts to obtain pre-judgment security in that action.

For purposes of clarification, we advise that our office has initiated foreclosure proceedings on behalf of Slade's Ferry Trust Co. against M.A.T. Marine concerning the property located on 1 Fish Island in New Bedford, Massachusetts. There is currently scheduled a foreclosure auction to take place on November 18, 2004, at 11:00 a.m. at the site. And it is our intention to proceed forward with the foreclosure auction as scheduled.

Should you have any questions or comments, or require further clarifications, please do not hesitate to advise.

Very truly yours,

SAUNDERS & MICHAUD, LLP

ANDREW B. SAUNDERS

ABS/eaf

LAW OFFICES OF

SAUNDERS & MICHAUD, LLP

Andrew B. Saunders
Joseph L. Michaud
Sandra G. Saunders
Christopher T. Saunders

November 9, 2004

700 Pleasant Street
New Bedford, MA 02740
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Should you have any questions or comments, or require further clarifications, please do not hesitate to advise.

Very truly yours,

SAUNDERS & MICHAUD, LLP

ANDREW B. SAUNDERS

ABS/eaf

Exhibit B

N. A. Peloquin

From: "Victor Bass" <vbass@burnslev.com>
To: <npeloquin@earthlink.net>;
Cc: <matmarine9@aol.com>
Sent: Monday, November 08, 2004 3:10 PM
Subject: Sterling/MAT Marine
 Norman,

In response to your letter today, Kathy Hallam has provided the requested detail on the equipment, shown below the signature block..

With respect to your other questions:

1. The Bank has not responded to our offer of settlement or my phone call last week. I have no reason to expect that they would subordinate their lien to any attachment or lien you got, whether on the equipment or the real estate, so this should be irrelevant to Sterling.

2. I am advised that MAT Marine did not grant any security interest on the listed equipment to any sureties, which should confirm what you learned when you did the UCC search of which you advised the Court. Accordingly, your client should have no subrogation concerns. While it is thus irrelevant to the issue before us, I am also advised that there was no default on the Rye job, and that the issues which arose have been resolved without liability on MAT Marine's part.

Please let me know on which equipment Sterling will accept a voluntary security interest, or whether you will continue to request a real estate attachment from the court. I look forward to hearing from you promptly.

Vic

Victor Bass
 Chair, Bankruptcy Group
 Burns & Levinson LLP
 125 Summer Street, Boston MA 02110
 175 Derby Street, Hingham MA 02043
 617-345-3290 fax: 3299

Komatsu PC 1100 excavator 1999 excellent condition

65' Twin screw tug 1984 new engin's last year, excellent condition

101' tug built in 1952 good condition

50 ton American Crane 1980 -597 model new bottom put on 2 years ago good condition

100 ton barge and supporting buckets Built in 1956 spud barge excellent condition

1000 c.y. dump scow Built in 1956 good condition

Vibro hammer 1995 model 216 good condition

Diesel and hydraulic hammer Vulcan model 958 good condition

Underwater burning gear

Generators/ welders

50 ton lowbed 2002 Fontaine drop deck like new

32 yard dump trailer 1978 Trailstar fair condition

938 Loader 1998 Liek new condition

D3 bulldozer 1998 excellent condition

Bobcat with all attachments 1997 excellent condition

320 excavator 1998 excellent condition

215 excavator 1985 fair condition, replace botton and tracks 2 yrs ago

Rubber tire back hoe 2002 Pc150 Like new

2 Ford trucks 1997/99 F350's good contition

Exhibit C

Fax

To: **ATTN: NORMAN PELOQUIN**

From: **HERBERT KISTLER**

Fax: **815089918300**

Pages: **5**

Date: **11/03/2004 03:36pm**

Re: **562367**

Comments:

IF RECEIVED IN ERROR PLEASE PHONE 1-800-799-8362.

DEPARTMENT OF
TRANSPORTATION
U.S. COAST GUARD
CG-1313 (Rev. 4-87)

GENERAL INDEX OR ABSTRACT OF TITLE

* CORPORATE NAME CHANGED TO:
C & M MARINE TOWING, INC.

This vessel was built at New Orleans, La. by Hiezling, Inc. for U. S. NAVY in 1952 of steel

as appears by certificate of M.B. Miller, Director, Ship Production Office, Production Directorate, Naval Ship Systems Command, on file at New Bedford, Mass.

562367
Official number
OLLNEY
REG

(1) CHICOPPEA
Official number

(ex. USN ITM-747, LT 1966)

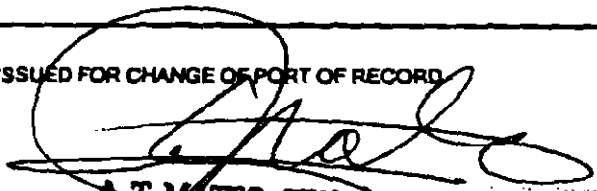
Page 1 of 8

GRANTOR	GRANTEE	Kind of interest and part conveyed	Date of interest and date of maturity	Consideration or amount and date of change amount	Received for record	Recorded	Time of endorsement and entry or approval of home port	Port where endorsed
United States of America	Edward O. Sanchez, Jr.	Bill/Sale the whole	3/22/74	\$125,100.00	1/31/75 9:05 AM	S-28 P-72	1/31/75 9:00 AM New Bedford, Mass.	
Edward O. Sanchez, Jr.	Chicopee Towing Co., Inc.	Bill of sale	6/10/75	* & ovc Ten dollars	July 11, 1975	Book S-29 Page 63	July 11, 1975 8:45 AM 5057 N. Bedford	
CHICOPEE TOWING CO. INC.	CROSBY TOW BOAT CO., INC.	B/S	27 MAY 86		27 MAY 86 3:10 PM	BS 86B PG 570		
CROSBY TOW BOAT CO. INC.	CAPE COD BANK AND TRUST COMPANY	100%	27 MAY 86	\$2,133,250.00	28 MAY 86 3:25 PM	PM 48 PG 502	28 MAY 86 3:26 PM 28 MAY 86 3:27 PM BOSTON	
CAPE COD BANK AND TRUST COMPANY	CROSBY TOW BOAT CO., INC.	Sat	29 Aug 89	\$2,133,250.00	01 Sep 89 10:15 a.m.	Book PM-72 Page 045	filed @ BOSVD 8/31/89 @ 2:30 p.m.	
C & M MARINE TOWING, INC.	NEW BEDFORD INSTITUTION FOR SAVINGS	100%	30 Aug 89	\$1,000,000.00 + Inc.	01 Sep 89 10:50 a.m.	Book PM-72 Page 046	filed @ BOSVD 8/31/89 @ 2:30 p.m.	
C & M MARINE TOWING, INC.	CHESTER A. CROSBY, JR.	P/M 100%	30 Aug 89	\$200,000.00 + Inc.	01 Sep 89 11:00 a.m.	Book PM-72 Page 047	filed @ BOSVD 8/31/89 @ 2:30 p.m.	

DEPARTMENT OF TRANSPORTATION U.S. COAST GUARD CG-1332A (Rev. 6-93)		GENERAL INDEX OR ABSTRACT OF TITLE CONTINUATION SHEET NO. 1				OFFICIAL NO. 562367	
INSTRUMENT SM	% CONVEYED 100	DATE 19 01 95	AMOUNT \$200,000.00	BOOK PM-94	PAGE 187		
FILED PORT BOSTON, MA		DATE 25 01 95	TIME 2 21 PM		DATE TERMINATED		
GRANTOR CHESTER A. CROSBY, JR.							
GRANTEE C & M MARINE TOWING, INC.							
INSTRUMENT AMPM	% CONVEYED 100	DATE 20 01 95	AMOUNT \$900,000.00	BOOK PM-94	PAGE 188		
FILED PORT BOSTON, MA		DATE 25 01 95	TIME 2 21 PM		DATE TERMINATED		
GRANTOR C & M MARINE TOWING, INC.							
GRANTEE NEW BEDFORD INSTITUTION FOR SAVINGS							
INSTRUMENT	% CONVEYED	DATE	AMOUNT	BOOK	PAGE		
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 ☐ ISSUED FOR CHANGE OF PORT OF RECORD

DATE: 3 2 95 TIME: 5 39 PM
 PAGE: 2 OF 2 PORT: BOSTON, MASSACHUSETTS


 A.T. MATEO, CW04, USCG
 VESSEL DOCUMENTATION OFFICER
 DOCUMENTATION OFFICER

DEPARTMENT OF
TRANSPORTATION
U.S. COAST GUARD
CG-1332A (Rev. 6-93)

**GENERAL INDEX OR ABSTRACT OF TITLE
CONTINUATION SHEET NO.**

OFFICIAL NO.

562367

INSTRUMENT SMTG	% CONVEYED 100	DATE 08 06 02	AMOUNT \$900,000.00	BOOK 02-105	PAGE 549
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GRANTOR

Refers to Book 72 Page 046

Fleet National Bank f/k/a New Bedford Institution for Savings

GRANTEE

C & M Marine Towing, Inc.

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DOCUMENTATION OFFICER

PREVIOUS EDITIONS ARE TO BE USED

GENERAL INDEX OR ABSTRACT OF TITLE
Continuation Sheet No. 3

Official No.
562367

ISSUED AS AN ABSTRACT OF TITLE AS OF

DATE: November 03, 2004 TIME: 08:19 AM

HERBERT KISTLER

NATIONAL VESSEL DOCUMENTATION CENTER